NO. 82-1032

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

HERMAN J. DOUCET,
Plaintiff-Petitioner,

versus

DIAMOND M DRILLING COMPANY,
Defendant-Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF BY RESPONDENT DIAMOND M DRILLING COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF ARGUMENT

Petitioner's version of the facts is riddled with conjecture, supposition and error. Rather than undertake a time-consuming line-by-line attack, Diamond M adopts the facts as set forth by the Fifth Circuit, as follows:

> "Herman J. Doucet injured his back while working as a pusher for an oil well casing crew on a submersible drilling barge in the Gulf of Mexico, twenty miles off the Louisiana shore. Upon suit brought under 33 U.S.C. §905(b), a jury in the Western District of Louisiana absolved Chevron U.S.A., Inc. of negligence and found that Diamond M Drilling Company was guilty of negligence proximately causing Doucet's injuries. His damages were assessed at $600,000, reduced by ten percent for his contributory fault. Judgment was entered for $540,000 less $65,213.64 awarded American Home Assurance Company as the intervening Diamond M compensation carrier. Diamond M appeals. We reverse.
>
> As operator, Chevron U.S.A., Inc., contracted with Diamond M for the drilling of the oil well, off the coast of Louisiana. Diamond M supplied the submersible drilling barge EPOCH, the drilling crews, and the roustabout crews. Chevron contracted with Offshore Casing Crews, Inc., Doucet's employer, for the oil well casing operations which were to be prosecuted on board the vessel.
>
> April 21, 1977, aboard the EPOCH, Doucet was the foreman (pusher) of the five man

casing crew employed by and working for Offshore, executing the casing contract for Chevron. The casing crew was working in conjunction with the roustabouts employed by the vessel. Doucet had five years experience as a pusher, and had worked on many similar jobs, which usually ran five to ten to twenty-four hours, depending upon weather and other conditions.

Beginning at approximately 11:30 P.M., the casing crew spent an hour and a half getting the casing equipment ready to go. A trolley line was rigged from the drill floor to the pipe rack. At Chevron's direction, Doucet's crew had brought five rubber thread protectors aboard the EPOCH. They were to replace the metal thread protectors originally attached to the end of each pipe joint to protect the threads from damage while being moved about from place to place. The casing crew showed the Diamond M roustabouts how to replace the metal protectors with the rubber ones before sending the pipe along to the platform. As a matter of fact, the casing crew removed the first five metal protectors and put on the rubber ones while the joints lay on the pipe rack. The casing crew then returned to the rig floor and began operations.

When the pipe is taken from the pipe rack and arrives at the point where it is to be set in the drilling hole the rubber protector

is unsnapped and sent back down the trolley to be used on the succeeding joints.

In six to seven years work in casing operations, Doucet was experienced in taking off both metal and rubber pipe thread protectors and had worked with metal protectors on approximately half of the jobs he had been on. The casing pipe joints were hoisted from the pipe rack onto the drilling floor by the draw works which were operated by the driller, a Diamond M employee. Doucet would unsnap the rubber protectors from the joints and guide the joints into the drill hole. After running about an hour of casing (twenty to twenty five lengths), Doucet noticed that a drilling floor worker was unable to remove a metal protector. Intending to remove the metal protector, Doucet picked up a 36 inch pipe wrench and placed it around the protector. Upon applying the wrench Doucet says he realized that the pipe was hanging too low, that is, about 2 ½ feet off the drilling floor (Doucet was only 5 ½ feet tall) so he 'hollered to' the driller, a Diamond M employee, to 'raise the joint a little.' Hand signals are often used in such a situation but Doucet was holding the wrench with both hands and in that position could not give a hand signal. The driller was somewhere between ten and twenty feet away. At trial, the driller did not recall the incident, but testified that such a verbal request if given and heard would have been

complied with as a matter of course. For whatever reason, the joint remained below waist level and Doucet did not repeat his request, he did not wait on a lift, and there is no evidence that he asked for the assistance of a welder to cut off the metal protector with a blow torch. Instead, he energetically jerked on the metal protector six or seven times and then felt a hard pain in his back. This took place around 2 A. M. on April 22, 1977, and that is what this litigation is about.

After the incident, Doucet quit working because of the pain in his back but remained aboard the EPOCH until the job was completed. For eight or ten days afterward he did not go to a doctor. He had had two back injuries prior to this one. Fourteen years previously he had fractured three vertebrae and was unable to work for six weeks. The second injury occurred about 1975 when Doucet pulled a muscle in his back and missed three to four weeks of work. Doctors were of the opinion that because of his back condition Doucet could not permanently return to heavy manual work, such as that of a longshoreman or roughneck. His fourth grade education substantially restricted his possibilities of finding sedentary work. An expert testified that the injuries caused a loss of $561,385.80 in future wages and this testimony was not contradicted."[1/]

1/ *Doucet v. Diamond M Drilling Co.*, 683 F.2d 886, 888-889 (5th Cir. 1982)

Diamond M is constrained to correct one egregious error in petitioner's Statement of Facts. On at least two occasions, petitioner refers to undocumented portions of his own testimony and the testimony of Mr. Emery Richard in support of his statement that Diamond M "*ignored*" his request to "pick up a little" on the pipe. [Pet. for Cert. p. 6] These statements infer that the driller, Mr. Billy Buchans, heard and declined Doucet's request. 2/ There is no evidence in the record to support this statement.

ARGUMENT

I. THE WRIT SHOULD BE DENIED BECAUSE THE FIFTH CIRCUIT APPLIED THE STANDARD OF REVIEW REQUIRED BY THE DECISIONS OF THE COURT

Despite the petitioner's claims to the contrary, the decision of the Court of Appeals did not consider an important and undecided question of Federal Law that should be settled by this Court. The Fifth Circuit directly followed the applicable decisions of this Court. Accordingly, the writ cannot be granted under Rule 17 on the basis of an important and unresolved question.

A. The Court of Appeals Applied the Standard of Review for the Motion for Directed Verdict or Judgment Non Obstante Veredicto dictated by this Court.

In overturning the District Court's denial of Diamond M's

2/ WEBSTER'S THIRD NEW INTERNATIONAL COLLEGIATE DICTIONARY (UNABRIDGED) (3rd ed. 1971) defines "ignore" as follows: "to refuse to take notice of: shut the eyes to: disregard.will fully."

motion for directed verdict or judgment n.o.v., the Fifth Circuit applied the standard of review dictated by this Court. Petitioner objects that the standard of review used by the Court of Appeals is inapplicable to cases arising under section 905(b) of the Longshoremen and Harbor Worker's Compensation Act. The court below used the test adopted by the Fifth Circuit in *Boeing Company v. Shipman.* 3/ The late Robert A. Ainsworth, Jr., writing for the Court en banc, described the test as follows:

> "On motions for directed verdict and for judgment notwithstanding the verdict the Court should consider all of the evidence - not just that evidence which supports the non-mover's case - in the light and with all reasonable inferences most favorable to the party opposed to the motion. If the facts and inferences point so strongly and overwhelmingly in favor of one party that the Court believes that reasonable men could not arrive at a contrary verdict, granting of the motions is proper. On the other hand, if there is substantial evidence opposed to the motions, that is, evidence of such quality and weight that reasonable and fair-minded men in the exercise of impartial judgment might reach different conclusions, the motions should be denied, and the case submitted to the jury. A mere scintilla of evidence is insufficient to present a question for the jury. The motions for directed verdict and judgment n.o.v. should not be decided by which side has the better of the case, nor should they

3/ 411 F.2d 365 (5th Cir. 1969)

> be granted only when there is a complete absence of protative facts to support a jury verdict. There must be a conflict in substantial evidence to create a jury question. However, it is the function of the jury, as the traditional finder of the facts, and not the Court, to weigh conflicting evidence and inferences and determine the credibility of witnesses". 4/

Petitioner states that since his action "arose under a Federal Statute, . . . the *Boeing* rule should not have been applied to it." [Pet. for Cert. p. 12] Petitioner argues, without citation of authority, "that the language in many decisions of this Court suggests that the standard of review for jury verdicts arising under §905 (b) should restrict the Fifth Circuit from tampering with jury verdicts except in those cases where there are no protative facts to support the verdict. . . ." [Pet. for Cert. p. 12] In lieu of the *Boeing* standard, petitioner invites the application of the standard of review reserved for the Federal Employers' Liability Act 5/ and Jones Act 6/ cases. This standard, as set out in *Lavender v. Kurn* 7/ requires the court to direct verdict or grant judgment notwithstanding the verdict "[o]nly when there is a complete absence of probative facts to support the conclusion reached. . . ." 8/ Even if this Court were to apply this more rigirous standard, there are no probative

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4/ *Id.* at 374-75.

5/ 45 U.S.C. §51, *et seq.* (hereinafter referred to as "FELA").

6/ 46 U.S.C. §688.

7/ 327 U.S. 653 (1946)

8/ *Id.* at 653.

facts to support the jury's conclusion that Diamond M was negligent under the guidelines laid down in *Scindia Steam Navigation Co., Ltd. v. De Los Santos*,9/ The Fifth Circuit, however, appropriately applied the *Boeing* test rather than the *Lavender* test.

The *Lavender* standard for review of motions for directed verdict and judgments notwithstanding the verdict applies only to FELA and Jones Act cases. The *Lavender* test standard reflects the Court's attempt to give force to the congressional intent that FELA cases secure jury determinations in a larger proportion of cases than is true for other cases.10/ "The FELA test is peculiar to that kind of case as a consequence of the statute itself and is accordingly not applicable in non-FELA jury trials." 11/ As the court in *Boeing* pointed out, the FELA test should not be employed as a vehicle to re-establish the "scintilla" rule which has been rejected by the federal judiciary.12/

In contrast to the intent of Congress with respect to FELA and Jones Act cases, the legislative history of the LHWCA demonstrates that the appropriate standard of review is that used in common law cases. In the 1972 amendments to the LHWCA, Congress removed from longshoremen the remedy of unseaworthiness in exchange for significantly increased benefits. In limiting the remedies available to longshoremen, Congress intended to place the longshoremen and the shipowner in the same position as other litigants under the common law, as follows:

9/ 451 U.S. 156 (1981)

10/ *Boeing*, 411 F.2d at 371.

11/ *Id.* at 372.

12/ *Id.* at 372-73.

"The Committee has concluded that, given the improvement in compensation benefits which this bill would provide, it would be fairer to all concerned and fully consistent with the objective of protecting the health and safety of employees who work on board vessel for the liability of vessels as third parties to be predicated on negligence, rather than the no-fault concept of seaworthiness. *This would place vessels in the same position, insofar as third party liability is concerned, as land-based third parties in non-maritime pursuits. The purpose of the amendments is to place an employee injured aboard a vessel in the same position he would be if he was injured in non-maritime employment ashore, insofar as bringing a third party damage action is concerned, and not to endow him with any special maritime theory of liability or cause of action under whatever judicial nomenclature it may be called, such as "unseaworthiness", "non-delegable duty" or the like.*

* * *

Under this standard, as adopted by the Committee, there will, of course, be dispute as to whether the vessel was negligent in a particular case. Such issues can only be resolved through the application of accepted principles of tort law and the ordinary process of litigation - - just as they are in cases involving alleged negligence by land-based third parties. *The Committee intends that on the*

> *one hand an employee injured on board a vessel shall be in no less favorable position vis a vis his rights against the vessel as a third party than is an employee who is injured on land, and on the other hand, that the vessel shall not be liable as a third party unless it is proven to have acted or have failed to act in a negligent manner such as would render a land-based third party in non-maritime pursuits liable under similar circumstances."* 13/

In sharp contrast to the announced intent regarding the FELA and Jones Act, Congress felt that the rights of a longshoremen against a vessel should be no greater than any other common law litigant. 14/ Congress did not intend to secure for longshoremen a greater number of jury verdicts in section 905(b) actions. 15/ Thus, the appropriate standard of review is not that employed in FELA and Jones Act cases, but rather the common law standard as set out in *Boeing*.

13/ H. R. Rep. No. 92-1141, 92nd Congress, 2d Session, 3 U.S. Code Cong. & Admin. News, pp. 4699, 4703-4704 (emphasis added).

14/ The only exceptions, made in the interest of uniformity of application, were that comparative rather than contributory negligence should be applied and that assumption of risk would not be a valid defense. *Id.* at 4705.

15/ In applying the LHWCA scheme to oil workers on vessels working on the outer continental shelf, Congress implicitly rejected petitioner's argument that oil workers, because of the hazards of their profession, are entitled to the same treatment as seamen or railway workers. See *Longmire v. Sea Drilling Corp.*, 610 F.2d 1342 (5th Cir. 1980); 99 Cong. Rec. 6963 (1953). This may appear somewhat unfair, but the remedy lies in legislative not judicial actions.

In addition to applying a standard of review consistent with congressional intent, the decision of the Fifth Circuit is consistent with the standard of review set out in *Scindia*, which decision expressly rejects the standard of review suggested by petitioner. After discussing questions related to the shipowner's awareness of defects in a winch, the Honorable Byron R. White stated, as follows:

> "We raise these questions but cannot answer them, since they are for the trial court in the first instance and since neither the trial nor the appellate courts need deal with them unless there is sufficient evidence to submit to the jury either that the shipowner was aware of sufficient facts to conclude that the winch was not in the proper order, or that the winch was defective when cargo operations began and that Scindia was chargeable with knowledge of its condition." 16/

Whereas under *Boeing* there must be conflict in substantial evidence to create a jury question, *Scindia* holds that a section 905(b) case should not go to the jury unless there is adequate evidence the shipowner was aware of sufficient facts to conclude a hazard existed which the vessel owner was chargable with knowledge of an unreasonable hazard existing when the operations commenced. If anything, the *Boeing* standard of review applied by the Fifth Circuit is less restrictive, not more restrictive than the standard for review laid down by this Court in *Scindia*. Accordingly, the Fifth Circuit's standard of review of the motion for directed verdict or judgment n.o.v. was consistent with

16/ 101 S.Ct. at 1627.

the decisions of this Court on this issue and with the legislative history of section 905(b). Thus, the writ should be denied because there is thus no unresolved question of Federal Law for this Court to decide.

B. The Fifth Circuit Properly Applied the Standard of Review

The Court of Appeals correctly applied the standard of review to the facts of this case. The uncontradicted evidence shows that the rubber thread protectors, designed solely to protect the threads on the casing pipes, are only used about half the time to expedite the casing operation. [Tr. 42, 43, 88, 127, 141, 196.] Petitioner's own safety expert, Mr. Paul Montgomery, testified that his preference for rubber thread protectors did not arise from considerations of safety. 17/ Thus, there was no evidence that the failure

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17/ "Q. Now, are there any safety practices or procedures or property procedures which apply to the use of rubber protectors in a casing operation?

A. I like to use quickie protectors. Not from a safety consideration, but for other considerations.

Q. What reasons do you use them?

A. First off, I would like to take the metal protectors off the pipe while it's on the racks and it gives you an opportunity to look at the threads and possibly eliminate a problem that you might have later on while you are actually running the casing. Also, if necessary, you can clean the threads then put the metal protectors back on just hand tight and since you only have a limited supply of quickie protectors, you put them on just before you take the pipe up onto the rig floor to be run. It saves a great deal of time for the casing crew and speeds up the operation in my experience to use quickie protectors." [Tr. 237-38.]

of the roustabouts to replace the metal protector with a rubber protector was negligent.

Petitioner did not adduce substantial evidence at trial that the Diamond M driller in charge of the pipe lift saw petitioner was trying to remove the metal thread protector and neglected to lift the pipe when requested. Petitioner testified that he did not make any hand signals to the driller and requested only once that the driller raise the pipe. [Tr. at 202.] Petitioner testified that he received no response from the driller indicating that he had heard the request. [Tr. 238.] Moreover, the testimony of neither the Diamond M driller nor the other members of the petitioner's crew established that the Diamond M driller was or should have been aware that the pipe should have been raised much less that the hazard of injury was present. As petitioner himself indicated, the only way he could tell whether the metal protector would come off easily was to use the pipe wrench on it. [Tr. 263.]

Application of the *Scindia* standard to the facts of this case shows that no jury issue was created since there was not sufficient evidence that Diamond M was aware of sufficient facts to conclude that an unreasonable hazard existed; or alternatively, that Diamond M was chargeable with the knowledge of an unreasonably hazardous condition that existed at the commencement of the casing operations. The Fifth Circuit, correctly applied *Scindia* and *Boeing* in overturning the District Court's denial of the motion for directed verdict or judgment n.o.v.

II. THE WRIT SHOULD BE DENIED BECAUSE THE DECISION OF THE FIFTH CIRCUIT DOES NOT CONFLICT WITH DECISIONS IN THE SAME OR OTHER CIRCUITS

This Court should deny the writ of certiorari because the Fifth Circuit's decision in this case is not in conflict with its own decisions or with those of other Courts of Appeal. In an attempt to state a reason for the granting of the writ, petitioner has manufactured a spurious conflict among the decisions of the Fifth Circuit and other circuits reviewing jury verdicts under section 905(b). Even the most detailed analysis of the authorities cited by petitioner fails to disclose this conflict.

Petitioner correctly points out that when enumerating the standard for reviewing jury verdicts in section 905(b) cases, the Fifth Circuit has consistently applied the *Boeing* standard. 18/ Petitioner is incorrect, in his characterization of the Honorable John R. Brown's opinion in *Chiasson v. Rogers Terminal and Shipping Corp.* 19/ In that opinion, the former Chief Judge stated, "The record provides support for the jury's finding, which we are neither inclined

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18/ *Samuels v. Empresa Lineas Martimas Argentinas*, 573 F.2d 884 (5th Cir. 1978), cert. denied, 443 U.S. 915 (1979); *Stockstill v. Gypsum Trans.*, 607 F.2d 1112 (5th Cir. 1979), cert. denied, 451 U.S. 969 (1981); *McCormack v. Noble Drilling Co. of California*, 608 F.2d 169 (5th Cir. 1979); *Hebron v. Union Oil Co. of California*, 634 F.2d 245 (5th Cir. 1981); and *Doucet v. Diamond M Drilling Co.*, 683 F.2d 886 (5th Cir. 1982).

19/ 679 F.2d 410 (5th Cir. 1975)

nor permitted to disturb on appeal." 20/ Although he cited two Jones Act cases, 21/ there is no indication that Judge Brown intended to apply a standard more restrictive than *Boeing*. The language in the Jones Act cases to which the judge referred the reader merely states that a jury verdict will be sustained if there are facts from which a jury might infer negligence 22/, a statement consistent with *Boeing*. The Court did not characterize the quality of the evidence when it reviewed the verdict. Indeed, the evidence was substantial: there was direct, rather than inferential, evidence that the defendant had breached its duty to the plaintiff. Thus, it is at best an exaggeration to state that Judge Brown's opinion in *Chiasson* is in conflict with the other decisions in the circuit.

The decisions of the Fifth Circuit do not conflict with those in other jurisdictions. In order to create the illusion of conflict, petitioner has chosen a section 905(b) case 23/ that cites another section 905(b) case 24/ that in turn cites, among others, an FELA case. 25/ Neither of the section 905(b) cases adopt a standard that conflicts with *Boeing*:

20/ *Id.* at 412.

21/ *Schulz v. Pennsylvania R. Co.*, 350 U.S. 523 (1956); *Sanford Bros. Boats Co. v. Vidrine*, 412 F.2d 958 (5th Cir. 1969).

22/ *Schulz*, 350 U.S. at 526; *Sanford*, 412 F.2d at 963.

23/ *Johnson v. A/S Ivarans Rederi*, 613 F.2d 334 (1st Cir. 1980), cert. denied, 499 U.S. 1135 (1981).

24/ *Rios v. Empresas Lineas Maritimas Argentinas*, 575 F.2d 986 (1st Cir. 1978).

25/ *Brady v. Southern Ry. Co.*, 320 U.S. 476 (1943).

the Courts only state, in language repeated by the court in *Boeing*, the general principles applicable to review of a motion for judgment n.o.v. and do not address the quality of the evidence on which the jury based its verdict. Moreover, as support for its general statements concerning the standard of review, the Court in *Rios* cited not only an FELA case but several cases involving non-statutory causes of action as well.[26]

Using the technique employed by petitioner, it is just as permissible to conclude that FELA and non-statutory cases share the same standard of review. The mere inclusion of an FELA case in a string citation supporting a general proposition in an LHWCA case is not an indication that the Court intended to adopt a similar standard for section 905(b) cases. Petitioner has cited no other cases to support his claim of conflict among the circuits. Thus, there is no reason to grant the writ of certiorari on the basis of conflicting decisions.

III. THE WRIT SHOULD BE DENIED BECAUSE THE FIFTH CIRCUIT DECIDED THE CASE IN A MANNER CONSISTENT WITH THE DECISIONS OF THIS COURT ON THE ISSUES OF ASSUMPTION OF RISK AND THE STANDARD OF NEGLIGENCE

A. The Court of Appeals Did Not Require Petitioner to Assume the Risk of Injury

The Fifth Circuit did not hold that the petitioner assumed the risk of injury. Citing the decision of this Court in *Scindia*, it was stated "The defense of assumption of the risk is un-

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26/ *Rios*, 575 F.2d at 990.

available in §905(b) litigation."27/ In reversing the Trial Court's denial of Diamond M's motion for directed verdict or judgment n.o.v., the Court of Appeals determined not that petitioner assumed the risk of injury, but that there was no sufficient evidence that Diamond M had violated the duty imposed in *Scindia*. Justice White described the duty of the shipowner in this fashion:

> "This duty extends at least to exercising ordinary care under the circumstances to have the ship and its equipment in such condition that an expert and experienced stevedore will be able by the exercise of reasonable care to carry on its cargo operations with reasonable safety to persons and property, and to warning the stevedore of any hazard on the ship or with respect to its equipment that are known to the vessel or should be known to it in the exercise of reasonable care, that would likely be encountered by the stevedore in the course of his cargo operations and that are not known by the stevedore and would not be obvious to or anticipated by him if reasonably competent in the performance of his work".28/

Diamond M's duty under *Scindia* was twofold. First, it requires that the shipowner have its vessel and equip-

27/ *Doucet*, 683 F.2d at 890, n.3.

28/ 394 U.S. at 416, n. 18.

ment 29/ in such condition that an experienced and expert casing worker would be able by the exercise of reasonable care to carry on his work with reasonable safety. Second, Diamond M was required to warn petitioner of hazards that he might encounter in the course of his work that were either not known to him or would not be obvious to him or anticipated by him if he were reasonably competent in the performance of his work. There was no evidence adduced at trial that the failure to replace the metal protector with a rubber protector rendered the equipment defective. The testimony showed that the replacement of the metal protectors with rubber protectors arises from operational rather than safety considerations. [Tr. 196, 327-28.]

Moreover, there was insufficient evidence that Diamond M violated its duty to inform petitioner of hidden risks of which Diamond M had or should have had knowledge. *Scindia* greatly limited the duty of Diamond M to inspect and supervise the operations of the casing crew.

> "[T]he shipowner has no general duty by way of supervision or inspection to exercise reasonable care to discover dangerous conditions that develop within the confines of the cargo operations that are assigned to the stevedores. The necessary consequence is that the shipowner is not liable to the longshoremen for injuries caused by dangers unknown to the owner and about which he had no duty

29/ As pointed out by petitioner, the rubber thread protectors were not Diamond M's equipment, but ordered by Chevron from Offshore Casing, Inc., petitioner's employer. [Tr. 255.]

to inform himself." 30/

The 1972 amendments to the LHWCA "did not undermine the justifiable expectations of the vessel that the stevedore would perform with reasonable competency and see to the safety of the cargo operations." 31/

The Fifth Circuit correctly decided that there was insufficient evidence that Diamond M breached any duty to the petitioner under this *Scindia* standard. There was no evidence adduced at trial indicating that the Diamond M driller was aware of petitioner's request to raise the pipe. Additionally, there was no evidence to show that the Diamond M driller should have known of the need to raise the pipe. Diamond M and its driller had no general duty by way of inspection to discover any dangerous conditions that developed within the confines of the casing operation. Accordingly, Diamond M is not liable to petitioner for injuries caused by conditions unknown to Diamond M and about which Diamond M had no duty to inform itself.

More importantly, Diamond M was entitled to assume that petitioner would perform his job with reasonable competence and see to his own safety in the performance of the casing operations. 32/ Only petitioner was in a position to appreciate the risk involved in removing the thread protector in this manner. It was a task frequently undertaken with no difficulty whatsoever. If a problem was encountered with its removal, Diamond M was justified in its expectation

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30/ 101 S. Ct. at 1624.

31/ *Id.*

32/ *Id.*

that Mr. Doucet would employ the several other means available to safely accomplish this task. Petitioner testified that the thread protector could have been returned or put aside to permit removal with a wrench or blowtorch. [Tr. 260-61.]

The Court of Appeals did not find that petitioner assumed the risk, but rather that there was no evidence that Diamond M had breached the duties imposed on it by this court in *Scindia*.

B. The Fifth Circuit Applied the Standard of Shipowner's Negligence Consistent With the Decision of This Court

The standard of shipowner negligence used by the Court of Appeals is the same standard adopted by this court in *Scindia*. As noted above, the shipowner fails to meet his duty under *Scindia* if he fails "at least to warn the stevedore of *hidden* danger which would have been known to him in the exercise of reasonable care ....." 33/ It would be inconsistent with the LHWCA to hold that the shipowner has a continuing duty to take reasonable steps to discover and correct dangerous conditions that develop during the casing operation.34/

The Fifth Circuit applied this standard and determined that the evidence at trial was insufficient to have supported a conclusion by the jury that Diamond M breached any duty to petitioner. There is no evidence that custom or contract imposed additional burden on Diamond M. The

33/ 451 at U.S. 167, 172.

34/ *See* 451 U.S. at 169.

evidence at trial demonstrates that rubber protectors were used only about half the time. [Tr. 42, 43, 88, 127, 141, 196.] Petitioner has testified that in other operations pipes with cross-threaded metal protectors had been sent to the rig floor and the protector was removed either with a wrench or was cut off. [Tr. 260.] Therefore, custom indicates that merely sending a pipe with a metal protector to the rig floor was not negligent. The standard of negligence applied by the Fifth Circuit is consistent with the *Scindia* decision.

Petitioner's reliance on *Pluyer v. Mitsui OSK Lines* 35/ as an example of the Fifth Circuit's misapplication of *Scindia* is mislaid. The Court in *Pluyer* upheld the jury's verdict in favor of the plaintiff. 36/ The Court merely stated that the previous decisions of the Fifth Circuit did not conflict with *Scindia*. 37/ Petitioner has not shown any respect in which the Fifth Circuit differs from *Scindia*. Even if the Court of Appeals misapplied *Scindia* in the *Pluyer* decision, petitioner has not shown that the Court did likewise in the present case. Possible errors in *Pluyer* and other decisions afford no basis for review of this case. 38/

Petitioner's tabulation of the results of section 905(b) cases decided by the Fifth Circuit before and after this

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35/ 664 F.2d 1243 (5th Cir. 1982)

36/ *Id.* at 1247-48.

37/ *Id.* at 1247.

38/ To the extent that the standard applied in other decisions is relevant, Diamond M invites the Court to examine the Fifth Circuit's analysis of the *Scindia* decision in *Duplantis v. Zigler Shipyards, Inc.*, No. 81-3802, slip. op. at 3 (5th Cir. Nov. 29, 1982).

court's decision in *Scindia* creates no basis for the granting the writ. This case, like any other, turns on its own facts. If statistics were the proper means for deciding cases, petitioner's brief would be unnecessary.

Even accepting petitioner's figures, the statistics do not indicate that the Court of Appeals is applying a restrictive standard of negligence: Of the thirteen post-*Scindia* cases cited by petitioner, seven have been decided in plaintiff's favor or have been remanded to the Trial Court for reconsideration in light of *Scindia*. Petitioner's premature and inconclusive analysis provides no basis for the grant of the writ of certiorari.

CONCLUSION

The decision of the Fifth Circuit did not address an important and unresolved question of Federal Law that this Court should settle. The Fifth Circuit's opinion is consistent with decisions in the same and other circuits. Finally, the Court of Appeals decided this case in a way that conforms with the decisions of this Court. It is not the opinion of the Fifth Circuit that stands naked, it is petitioner who has neglected to clothe his argument with legal authority. Accordingly, the petition for writ of certiorari is without merit and should be dismissed.

Respectfully submitted,

(SIGNED) LLOYD C. MELANCON

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CERTIFICATE OF SERVICE

It is hereby certified that 3 copies of the above and foregoing brief were served by depositing such in a mailbox of the United States Postal Service with first-class postage affixed on the envelope addressed, as follows:

I. Jackson Burson, Jr., Esq., of Messrs. Young and Burson, counsel for Mr. Herman J. Doucet, P. O. Box 985, Eunice, Louisiana 70535-0985,

in accordance with the provisions of U.S. Sup. Ct. Rule 28.3, this 13th day of January 1983.

(SIGNED) LLOYD C. MELANCON